



# North Dakota Attorney General's LAW REPORT

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## HEARSAY - APPEAL

In *State v. Lee*, 2004 ND 176, 687 N.W.2d 237, the court affirmed the defendant's conviction of criminal mischief.

The defendant was apprehended after officers responded to a 911 telephone call from the victim stating the defendant had broken her passenger side car window. The victim failed to appear at trial but a tape recording of the 911 call was played to the jury. The defendant's attorney did not object to the admission of the tape.

On appeal, the defendant claimed that admission of the 911 tape was hearsay and that he was denied his 6th Amendment right to confront his accuser in light of *Crawford v. Washington*, 124 S.Ct. 1354 (2004).

Because the defendant did not object to the admission of the tape during the trial, the court

found the defendant waived any ground of complaint against its admission on appeal. A party may not later take advantage of irregularities that occurred during a trial unless the party objects at the time they occur allowing the court to take appropriate action, if possible, to remedy any prejudice that may result.

The court also concluded that admission of the tape was not obvious error. The admittance of the 911 tape as an excited utterance was not a clear deviation from an applicable legal rule under the current law at the time of the ruling. The court noted several states have held that a 911 call can be admitted as an excited utterance. Since *Crawford v. Washington* had not been decided at the time of the hearing, the court did not consider the effect of that case on any hearsay exceptions.

## DISCOVERY - CIRCUMSTANTIAL EVIDENCE

In *State v. Charette*, 2004 ND 187, 687 N.W.2d 484, the court affirmed the defendant's convictions of murder, gross sexual imposition, and burglary.

Evidence presented at trial established that the defendant killed and sexually assaulted an elderly woman. Although the defendant claimed he had been attacked by two men after leaving a bar, abducted, hit over the head, and was not able to remember anything until waking up later in the yard of his mother's home, evidence supporting the conviction included a coin purse belonging to the victim in the defendant's possession, a bloody footprint and a fingerprint found at the victim's home that matched the defendant, and a shirt the defendant was wearing containing blood stains matching the victim's DNA profile. In addition, the defendant's blood stained shoes and a box containing various items of the victim's property were discovered at his home. The defendant's girlfriend testified the pants found at the crime

scene belonged to the defendant, although this testimony was disputed by the defendant.

On appeal, the defendant claimed the evidence was insufficient to support the guilty verdicts. Rejecting these claims, the court noted there was an abundance of evidence in the record from which a rational jury could have found the defendant guilty on all counts. The court noted that few cases with such overwhelming circumstantial evidence had come before the court. The fact that potentially contradictory or inconsistent evidence may have been introduced at trial does not undermine the jury's verdict given the substantial and significant evidence in the case. Every factual inconsistency need not be resolved. Rather, it is the jury's role to weigh contradictory and inconsistent evidence to determine credibility and guilt.

The court also concluded it was not error to deny the defendant's request to allow him to try on the

pants found at the murder scene. The defendant wanted to demonstrate that the pants could not have been the ones he was wearing on the evening of the crime.

Noting the district court has broad discretion in admitting or excluding evidence, the court found the trial court did not abuse its discretion in refusing to allow the defendant to try on the murder scene pants. The pants were covered in blood and had been specially packaged for trial. The state argued that allowing the defendant to try on the pants would have created a potential biohazard harmful to those in the courtroom. However, evidence was presented that the defendant had gained considerable amount of weight during the almost year-long interval between the murder and trial date. Given this change in circumstances, a demonstration posed the risk of misleading the jury. In addition, the defendant presented considerable evidence to refute the state's assertion that the murder scene pants belonged to him.

The defendant also argued the court erred in allowing testimony from the victim's granddaughter at trial. The granddaughter was allowed to identify certain pieces of the defendant's property, including a coin purse the defendant turned over at a Bismarck emergency

room. The defendant claimed the state failed to reveal the availability of this testimonial evidence in its responses to discovery requests.

In this case, the state repeatedly informed the defendant that the victim's granddaughter could be called as a state's witness and defense counsel was free to interview her prior to trial. The statements made by every state's witness, including the granddaughter, were made available to the defendant by the state's open file policy. A "statement" under North Dakota Rule of Criminal Procedure 16 is defined quite technically and tends to emphasize formal, written, or recorded declarations. There was no indication the granddaughter made a formal statement regarding the identification of the victim's property but rather the prosecution spoke to her to gain a sense of whether she might be able to identify her grandmother's possession at trial. The fact the state did not formally record these pretrial interactions, disclose the results of these conversations, or highlight that the granddaughter may attempt to identify her grandmother's possessions at trial did not equate to a per se violation of Rule 16. Rule 16 does not require disclosure of all information arguably labeled "important" or "big," regardless of the form of such information.

### **EFFECTIVE ASSISTANCE OF COUNSEL**

In *Heckelsmiller v. State*, 2004 ND 191, 687 N.W.2d 454, the court reversed the district court's order denying Heckelsmiller's claim of ineffective assistance of trial counsel.

At the defendant's trial, counsel requested the sequestration of witnesses. Two potential witnesses for the defense, Heckelsmiller's grandmother and father, were denied the opportunity to testify because they did not comply with the sequestration order. For purposes of the post-conviction proceeding, these witnesses prepared affidavits to establish what their testimony would have been at trial. Trial counsel testified that he had requested additional information from these witnesses but failed to receive any information corroborating their claims to be offered on behalf of Heckelsmiller. He testified that he was aware of the evidence they sought to offer but, having considered this unsubstantiated evidence, he chose not to put these witnesses on the stand due to credibility concerns, and found no need to sequester them.

At some point during the trial, Heckelsmiller's counsel apparently decided to change his trial strategy and call the witnesses to testify. Because they were present in the courtroom during previous witness's testimony, the state promptly objected to their testimony and the district court judge refused to let them testify because of the sequestration order. At this point, trial counsel should have made an offer of proof as to why those individuals should be allowed to testify despite the sequestration violation but counsel did not. In addition, no other affirmative argument was made to justify calling these witnesses to testify.

Although trial counsel is under no obligation to call any defense witness he does not believe to be credible, he obviously developed enough confidence in these two witnesses to call them to the stand during trial. His reasoning that he may have called these witnesses to accommodate the family's desire to testify is no excuse for not making an offer of proof once the testimony was challenged. When counsel consciously altered his trial strategy and decided to call these

witnesses to testify, he assumed a basic responsibility to vindicate that alteration. Trial counsel's concerns over credibility may have provided a valid justification for not anticipating calling either of these witnesses and initially not insuring compliance with the sequestration order but the same concerns did not justify the decision essentially to abandon the new strategy to call the witnesses.

These witnesses would have offered corroborating testimony to bolster Heckelsmiller's only defense for the crime of criminal trespass that there was a family arrangement to stay at the premises. One witness would have testified that he had given Heckelsmiller permission to stay at the home, which would have a direct impact on a jury's determination of whether Heckelsmiller possessed the required mental state to be guilty of criminal trespass.

Trial counsel should have pointed out that the witnesses did not observe a significant quantity of the state's case directly relevant to their testimony and, then at the very least, counsel should have asked the court to inquire into the testimony the

witnesses did observe. The district court judge never-the-less excluded the testimony, and trial counsel should have preserved the record for appeal permitting a meaningful appellate review of the trial judge's refusal to allow the witnesses to testify.

The court found that Heckelsmiller's counsel's representation fell below an objective standard of reasonableness when, after calling the witnesses to the stand and discovering that they had not complied with a defense-requested sequestration order, he made no offer of proof as to the substance of the testimony despite this testimony being critical to corroborate Heckelsmiller's only defense.

The court would not speculate whether or not a reasonable probability existed that Heckelsmiller would have been acquitted of a crime requiring knowing misconduct if the witnesses were allowed to corroborate the defense. The significant point was that counsel's failure to make the offer of proof prevented a meaningful appeal on the issue of whether or not these witnesses should have been allowed to testify.

#### **PRELIMINARY HEARING - RIGHT TO COUNSEL - RECUSAL - SENTENCE**

In *State v. Murchison*, 2004 ND 193, 687 N.W.2d 725, the court affirmed the defendant's conviction of assault on a correctional institution employee.

The defendant claimed he was denied his constitutional right to effective assistance of counsel because he was not provided with court appointed counsel at his preliminary hearing.

A criminal complaint charge was filed against the defendant on July 22, 2003, alleging the offense occurred on June 12, 2003. The defendant requested the court appoint legal counsel for him at his initial appearance on August 15, 2003.

On September 19, 2003, Murchison appeared without counsel at his preliminary hearing. He did not file an application demonstrating he was indigent entitling him to court appointed counsel and no counsel had been appointed to represent him by that date. The defendant told the court he thought he had completed the necessary documents to receive the court appointed counsel and that the documents had been forwarded to the court by penitentiary officials. The defendant objected to a continuance of the preliminary hearing and it was held as scheduled with the defendant representing himself. Later that day,

after being bound over for trial, the defendant filed the appropriate papers demonstrating he was indigent and the court appointed counsel to represent him.

The defendant's attorney later indicated the defendant would be changing his plea and a jury trial was cancelled. At the hearing, the state informed the court the defendant would enter a conditional guilty plea with the right to appeal the issue of the court's failure to provide him an attorney at the preliminary hearing. The state recommended that the defendant receive a two year sentence of incarceration with all but six months suspended for three years. The court rejected the defendant's change of plea stating the nonbinding plea agreement was not acceptable and the jury trial was rescheduled the following week. The defendant was not present at the hearing. He later filed an amended motion to dismiss the charges claiming not only that he was denied his right to effective assistance of counsel at the preliminary hearing also that he had been denied his right to attend the change of plea hearing due because penitentiary officials failed to transport him to the hearing. The defendant also requested dismissal of charges on the ground that the trial court was biased against him because the

judge had prosecuted him for a prior offense. These motions were denied but the trial court did schedule a second preliminary hearing. The hearing was held, the defendant appeared with his court appointed counsel, and probable cause was found to bind the defendant over for trial.

A preliminary hearing is a critical stage of the proceedings at which the defendant has a constitutional right to representation by counsel.

There is no legal reason to appoint counsel for someone who can afford and obtain his own attorney and a defendant has the burden of establishing that he is indigent and qualifies for appointment of counsel. Although a good argument could be made that the defendant waived his right to counsel at the preliminary hearing held September 19, 2003, the court did not have to make that determination because the defendant was afforded a second preliminary hearing at which he was represented by court appointed counsel.

A defendant cannot sit silently and acquiesce in criminal procedures raising no objection and then assert on appeal that he was denied constitutional rights. The defendant did not object to the second preliminary hearing but informed the court that he was ready to proceed. After the hearing, the defendant stated he was ready to proceed to a jury trial on the charges. The defendant waived the issue of whether he was denied effective assistance of counsel at the September 19, 2003, preliminary hearing. He received the second preliminary hearing at which he was represented by counsel and he thereafter continued to be represented by counsel at all stages of the prosecution against him.

The defendant also claimed the district judge should have recused herself from the proceedings. When making recusal decisions, the trial judge must determine whether a reasonable

person could, on the basis of all the facts, reasonably question the judge's impartiality. Recusal is not required in response to spurious or vague charges of partiality. The inquiry is whether a reasonable person could, on the basis of the objective facts, reasonably question the judge's impartiality. The trial judge, in her order denying the defendant's motion to dismiss, stated that although it was possible she did prosecute the defendant, she had not been a prosecutor for more than 16 years, her involvement in the case would have been unrelated to the pending matter, and that she had no bias or prejudice against the defendant.

The defendant made a vague assertion the trial judge may have prosecuted him years ago in a prior offense. He had not submitted any evidence to support his claim. Without more, the court concluded that the defendant's claim of bias and prejudice by the trial court against him was insufficient for a reasonable person to question the trial judge's impartiality in the case.

The defendant also objected to the trial judge's sentencing decision. The trial judges ordinarily allow the widest range of discretion in fixing a criminal sentence and the appellate court's review of the sentence is generally confined to whether the court acted within the statutory sentencing limits. A trial judge's sentencing decision may be vacated if the judge substantially relied on an impermissible factor in determining the severity of the sentence.

The sentence the defendant received was within the statutory limits and there was no allegation the court relied upon an impermissible factor in determining the severity of the sentence. The defendant failed to demonstrate the court committed error in conducting the sentencing proceedings and failed to demonstrate prejudice or bias of the judge in imposing the sentence.

### **POST-CONVICTION PROCEEDING - MISUSE OF PROCESS**

In *Jensen v. State*, 2004 ND 200, 688 N.W.2d 374, the court affirmed the order dismissing Jensen's application for post-conviction relief.

Jensen was convicted of driving while his license was revoked, driving under the influence, and giving a false report to a law enforcement officer. The conviction resulted in at least two appeals and two prior dismissals of applications for post-conviction relief.

Jensen filed a third application for post-conviction relief, raising ten claims. The trial court denied Jensen's application without an evidentiary hearing.

The court's review of a summary denial of post-conviction relief is like the review of an appeal from a summary judgment. In seeking summary disposition, the movant bears the

burden of showing there is no dispute as to either the material facts or the inferences to be drawn from the undisputed facts and the movant is entitled to judgment as a matter of law.

N.D.C.C. § 29-32.1-12 provides that an application for post-conviction relief may be denied on the grounds of res judicata and misuse of process. The claim is res judicata if it was fully and finally determined in a previous proceeding. Misuse of process occurs when the applicant presents a claim for relief that the applicant inexcusably failed to raise in the proceeding leading to conviction or in a previous post-conviction proceeding, or if the applicant files multiple applications containing claims so lacking in factual support or legal basis as to be frivolous. Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues. Defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the post-conviction process by initiating a subsequent application raising issues that could have been raised in the earlier proceeding. In addition, defendants are not entitled to post-conviction relief when their claims are variations of previous claims that have been rejected.

The court found that the issues, or variation of issues, raised by Jensen in this post-conviction proceeding, had been raised in previous proceedings or, if not raised previously, Jensen had offered no excuse or justification for failing to raise those claims in prior proceedings.

In addition, the court concluded the trial court did not wrongly deny counsel to Jensen for his post-conviction proceeding.

The appointment of post-conviction counsel is a matter of trial court discretion and will not be reversed on appeal absent an abuse of that discretion. A trial court should read applications for post-conviction relief in the light most favorable to the applicant and, when a substantial issue of law or a fact may exist, the trial court should appoint counsel. However, a trial court does not abuse its discretion in refusing to appoint counsel when the application for relief is completely without merit. The trial court did not abuse this discretion in denying Jensen's request for court appointed counsel for this post-conviction proceeding.

### **SEARCH WARRANT - INFORMANT**

In *State v. Donovan*, 2004 ND 201, 688 N.W.2d 646, the court affirmed the trial court's suppression order.

Officers responded to a domestic disturbance call at a rural home of Jeff Coffin and Veronica Gascoine. Coffin was arrested and taken to jail. Gascoine, who was intoxicated and injured, was interviewed and, during the course of the interview, volunteered information about narcotics located within the home. After giving a consent to search, drug paraphernalia was discovered. A member of the local drug task force was contacted and Gascoine was again interviewed. She was read her *Miranda* rights and stated that the defendant had 20 bales of marijuana buried in his backyard and she had discovered him manufacturing methamphetamine. She also described the car allegedly involved in drug operations and told the officers where the car could be found.

The officers confirmed the location of the vehicle and talked to another agent who had interacted with Gascoine on two previous occasions. One occasion was when a pen tube with

methamphetamine residue was found in Gascoine's car but a passenger admitted ownership, not Gascoine. The second encounter incurred when Gascoine testified in a narcotics trial to establish an alibi for her accused daughter.

The agent's affidavit for a search warrant included these two encounters as proof of Gascoine's credibility but failed to mention the information was obtained second-hand or the nature of her testimony.

The warrant was issued and Donovan's house was searched. The officers did not find marijuana or signs of methamphetamine production but other evidence of drug violations was found.

Donovan moved to suppress the evidence arguing it was based on false information from an informant whose reliability was not established. Gascoine testified at the suppression hearing she did not remember telling the officers about the defendant's alleged drug activities, that she had never seen marijuana bales in his backyard, or had seen any evidence of methamphetamine production. The motion to suppress was granted.

The defendant argued the affidavit for the search warrant was misleading because it failed to mention it was based on second-hand information or the nature of Gascoine's testimony. A defendant who believes a search warrant was issued on the basis of a false or misleading affidavit can request a hearing authorized by Franks v. Delaware, 438 U.S. 154 (1978). A false affidavit statement under Franks is one that misleads the neutral and detached magistrate into believing the stated facts exist and those facts in turn affect the magistrate's evaluation of whether or not there is probable cause.

The defendant has the burden to prove false statements were made intentionally or with reckless disregard for the truth and whether this burden is met is viewed under the clearly erroneous standard. A finding of fact is clearly erroneous when it is induced by an erroneous view of the law, when there is no evidence to support it, and when, although there is some evidence, on the entire evidence the court is left with a definite and firm conviction a mistake has been made.

A large number of allegedly false statements support an inference of reckless disregard for the truth. Reckless disregard for the truth may be proved inferentially from circumstances evincing obvious reasons to doubt the veracity of the allegations. Mere negligence by the affiant, however, does not constitute reckless disregard for the truth.

The district court found the defendant met his burden because he was able to show the affidavit was written in a manner that mislead the magistrate regarding Gascoine's credibility. Reliability of an informant who is a criminal, a drug addict, or a pathological liar must be established. The officers who interviewed Gascoine had already discovered evidence of her narcotics involvement, making her a member of the "criminal milieu" whose reliability needed to be established.

The officers attempted to establish Gascoine's credibility through verification of her description of a car parked in a public parking lot with the owner's name displayed in the windshield. Credibility cannot be established by the use of easily obtainable facts and conditions existing at the time of the tip. The location and ownership of

the vehicle were easily obtainable facts existing at the time of the tip.

Gascoine testified that she did not remember saying anything to the officers about drug activity at the defendant's home. However, another officer testified overhearing her statements so the district court found she clearly made them. This finding was sufficient to show that the agent did not falsify Gascoine's statements in his affidavit.

The district court did find, however, an important part of the affidavit was written in such a manner that it likely misled the magistrate. The allegations in the affidavit that Gascoine had been truthful because she had answered questions truthfully in an incident that happened a year ago, and that she had testified under oath in a jury trial in cases involving several narcotics users, would lead a reasonable person to believe Gascoine had testified in more than one jury trial involving a number of narcotics users when in fact she had testified in only one trial. Although the agent said that the plurals in the sentence were typos, there was no way the magistrate would know without asking and there was no record that the magistrate asked. In addition, the magistrate was not notified that the testimony that Gascoine provided was not against narcotics users but to establish an alibi for her accused daughter. Omission of this information very likely misled the magistrate into thinking she had testified in more than one trial against narcotics users. The district court's findings that the agents statements were misleading was not clearly erroneous.

Once the statements have been found to be false or misleading, those statements should be set aside and the remainder of the affidavit looked at to determine if there was probable cause to issue the warrant.

When a search warrant is issued based on information provided by an informant, the informant's credibility is very important in determining whether probable cause exists. There is no presumption of reliability when the informant is someone who is a member of the "criminal milieu." Gascoine's credibility was not sufficiently established if misleading statements were stricken from the affidavit. An easily obtainable fact cannot be used to establish informant credibility. Since Gascoine was a member of the criminal milieu, something more substantial was needed to establish credibility.

### **INEFFECTIVE ASSISTANCE OF COUNSEL**

In *State v. Hayek*, 2004 ND 211, \_\_\_\_ N.W.2d \_\_\_\_, the court affirmed the defendant's convictions of various drug offenses.

The defendant claimed she was denied effective assistance of counsel because her attorney did not stipulate to a prior drug conviction before trial and did not object to character evidence against her. In rejecting these claims, the court noted that unless the record affirmatively shows ineffectiveness of constitutional dimensions, a defendant must provide the court with some evidence in the record to support the claim. The conviction will not be reversed unless the record

reveals the assistance of counsel was plainly defective and requires such reversal.

In this case, the record did not establish whether or not stipulating to defendant's conviction before trial and not objecting to character witnesses were part of the legitimate trial strategy or ineffective assistance of counsel. On the record, the court could not determine whether the defendant's attorney's conduct fell below the acceptable standards of reasonableness. This matter is more properly pursued in a post-conviction relief proceeding.

### **VOLUNTARINESS OF GUILTY PLEA - WITNESS RECANTATION**

In *Greywind v. State*, 2003 ND 213, \_\_\_\_ N.W.2d \_\_\_\_, the court affirmed the judgment denying Greywind's application for post-conviction relief.

Greywind was involved in two criminal cases represented by different attorneys. He was charged with burglary, terrorizing, and three counts of theft of property in one case and, in the second case, charged with conspiracy to commit murder and accomplice to tampering with a witness who was going to testify against him in the first case.

On February 17, 2000, Greywind and his attorney signed a Rule 11 plea agreement in which Greywind acknowledged his guilt in both the theft case and the conspiracy case. On February 18, 2000, Greywind appeared before the district court and was advised of his constitutional rights, acknowledged that he understood his rights and that he understood the contents of the plea agreement. A factual basis for the offenses was acknowledged by Greywind and his attorneys. The district court sentenced Greywind to 20 years imprisonment on the charge of conspiracy to commit murder and shorter terms of imprisonment on the other charges that were ordered to run concurrently with a twenty year sentence. A subsequent request for reduction of sentence was denied.

In August of 2003, Greywind filed an application for post-conviction relief arguing his guilty plea was involuntary because his attorneys coerced him into pleading guilty and, because he had a limited education, he was unable to understand the terms of the plea agreement. He also claimed that he had newly discovered evidence in the form

of affidavits from two co-conspirators recanting their prior statements to police implicating Greywind in the conspiracy and stating that the prior statements were coerced, untrue, and were made to help them receive lighter sentences.

An evidentiary hearing was held in which Greywind, his former attorneys, the conspirators, and law enforcement officers investigating the crimes testified. After the hearing, the court denied the post-conviction relief application.

The record reflected that the district court questioned Greywind at length at the time of his pleas, advised him of his rights, and the rights he was waiving by pleading guilty. The court also reviewed the plea agreement with him, asked whether he agreed with the factual basis given by the state for the pleas, and gave Greywind an opportunity to address the court. Greywind did not claim any lack of understanding but told the court his attorneys explained the provisions of the plea agreement to him and that he understood those provisions. The court found at the time of sentencing that the pleas were freely and voluntarily made and there was a factual basis for each of the pleas.

Although Greywind claims he did not understand the terms of the plea agreement because of his limited education, the records showed that he had substantial experience with the criminal justice system based upon several prior convictions and previous sentences to the state penitentiary. Greywind was originally scheduled to change his plea of guilty in December of 1999, but changed his mind and refused to do so. He again refused to change his plea at a January 2000 hearing

scheduled for that purpose. His attorneys then informed him of the possibility of life imprisonment and consecutive sentences if he had gone to trial and been found guilty. Greywind then pled guilty in February 2000. Informing a defendant of the prospect of receiving a harsher sentence if he were to go to trial is not coercion sufficient to render a guilty plea involuntary. Greywind acknowledged that he, of his own free will and accord, pleaded guilty in the cases. The district court found that there was nothing in the record to indicate that Greywind did anything other than enter a voluntary plea and the appellate court agreed. The district court did not abuse its discretion in refusing to allow Greywind to withdraw his guilty plea.

Greywind also argued the district court committed error in failing to grant him a new trial based on newly discovered evidence in the form of recanted statements of his co-conspirators, the persons he had hired to kill the witness.

Courts look upon recantation with suspicion and disfavor. The district court appropriately

examined the credibility of the recantations of the two co-conspirators. Affidavits of the two co-conspirators recanting previous statements were submitted in the application for post-conviction relief. The state introduced a videotape of these individuals making statements and the testimony of law enforcement officers involved in the arrest. The law enforcement officers testified they did not coerce the two individuals into making false statements and did not believe them to be intoxicated at the time.

The trial court noted that the police had substantial evidence implicating Greywind in the conspiracy case other than the statements of the two individuals. The task of weighing the evidence and judging the credibility of witnesses belongs exclusively to the trier of fact and the court will not reweigh credibility or resolve conflicts in the evidence. The district court's finding that the recantations were not credible was not clearly erroneous and the trial court did not err in rejecting Greywind's claim of newly discovered evidence.

#### **JURY - CHALLENGES - RECKLESS ENDANGERMENT - JURY INSTRUCTION - HEARSAY**

In *State v. Jaster*, 2004 ND 223, \_\_ N.W.2d \_\_\_, the court affirmed the defendant's conviction of reckless endangerment.

The defendant was living with his ex-wife. His ex-wife reported that the defendant assaulted her. When officers arrived at the defendant's home, the defendant was advised that he was under arrest. The defendant then slammed and locked his door. Officers broke down the door and observed the defendant holding a handgun pointed directly at one of the officers. After a struggle, officers removed the handgun from the defendant and arrested him.

The defendant first argued that two jurors should have been excused for cause. During *voir dire*, two jurors stated the prosecutor was presently performing legal work for them on estates that had not been closed. These two jurors were challenged for cause. The state did not oppose the challenge for cause but the district court denied the motion for the reason that there was an implied bias but not one that is automatic. The court instructed the defendant he could use his peremptories if he wished. A peremptory challenge was used to exclude one of the jurors. The other juror served as an alternate juror but

was released from service before the jury began its deliberations.

A district court must excuse a juror if the court is of the opinion that grounds for a challenge for cause are present. N.D.C.C. § 28-14-06 includes a challenge for cause relating to an attorney-client relationship with either party. Similarly, N.D.C.C. § 29-17-36 provides for a challenge for implied bias of a juror based upon an attorney-client relationship.

Previous cases of the court have ruled that a challenge for cause must be granted if an implied bias has been established under N.D.C.C. § 29-17-36. In this case, the district court abused its discretion in failing to grant the defendant's challenge for cause of these two jurors because of their current attorney-client relationship with the prosecutor.

Although the district court did commit error, the error did not require reversal under the circumstances. The defendant exercised only five of his six peremptory challenges. A defendant must exhaust all peremptory challenges before objecting to denial of a challenge for cause. Because the defendant used a peremptory challenge to exclude one of the jurors and the



other juror was released as an alternate juror before the jury began its deliberations, no biased jurors sat on this case and the defendant was not deprived of any of his rights.

The court also rejected the defendant's claim that testimony of the officer relating his conversation with the defendant's ex-wife was hearsay. The officer testified that the defendant's ex-wife told him there had been a fight between her and the defendant. The officer had worn a bullet proof vest because he had been advised that the defendant had guns in the house and would shoot a police officer.

The court found this testimony was not hearsay under the circumstances. A statement that is not offered to prove the truth of the matter asserted is not hearsay. The state was not attempting to establish that a fight had occurred or that the defendant had weapons at his residence and would shoot a police officer but offered the evidence to establish and explain the law enforcement officers' presence at the defendant's residence and the reason they took precautionary measures during the investigation.

The court also upheld the jury instruction regarding reckless endangerment. N.D.C.C. § 12.1-17-03 provides that risk occurred within the meaning of that section if the potential for harm exists, "whether or not a particular person's safety is actually jeopardized." The jury instruction in this case did not include the word "particular" but made reference only to whether or not a "person's

safety" was actually jeopardized. The defendant asserted that the word "particular" should have been included within the instruction.

Finding no error, the court noted that situations where a group of persons, not individually identified, are endangered, the state need not prove that any one particular person was endangered. To convict a person of reckless endangerment, the state must prove that at least one person was endangered or jeopardized by the defendant's conduct but the state need not identify the person or persons endangered or jeopardized.

The court found it unclear as to why the term "particular" was omitted from the pattern jury instruction used in this case. The omission of the term "particular" could lead a jury to believe it is irrelevant whether a person's safety is actually jeopardized or endangered. The court concluded that the omission of the word "particular" from the pattern jury instruction's definition of reckless endangerment renders that part of the instruction erroneous.

Even though this part of the instruction, standing alone, is erroneous, the court believed the instructions as a whole adequately and correctly informed the jury of the applicable law. The jury was required to find that at least one officer present was endangered or jeopardized. The jury was required to find beyond a reasonable that the defendant created a substantial risk of serious bodily injury or death to a "Crosby police officer."

### **SEARCH AND SEIZURE - PROBABLE CAUSE - ARREST - MISTRIAL**

In *State v. Linghor*, 2004 ND 224, \_\_\_\_ N.W.2d \_\_\_\_, the court affirmed the defendant's conviction of conspiracy to manufacture a controlled substance.

A deputy made a traffic stop of an automobile in which the defendant was a passenger. The deputy detected an odor of anhydrous ammonia coming from the vehicle and, in plain view in the back seat, saw what he determined to be paraphernalia to make drugs. The deputy called for assistance and then questioned the driver of the automobile.

When officers arrived, they determined that a mobile methamphetamine lab was present and instructed the deputy to arrest the driver. When questioned, the driver indicated a can of paint thinner which was part of the alleged drug

paraphernalia located in the backseat belonged to the defendant.

After the driver was arrested, the defendant was removed from the automobile and subjected to a pat down search. No weapons were found but the deputy had the defendant empty his pockets and a Wal-Mart receipt was found containing items present in the automobile that could be used to manufacture methamphetamine.

The defendant was then handcuffed, read his Miranda rights, and questioned. The defendant was not formally arrested until approximately 20 minutes after discovery of the Wal-Mart receipt.

The trial court denied the defendant's motion to suppress the Wal-Mart receipt and his statements in which he admitted purchasing items found in

the automobile. The defendant's trial resulted in a hung jury and a mistrial. After a second trial, the defendant was convicted.

A warrantless search is unreasonable unless it falls within a recognized exception to the warrant requirement. A search incident to a valid custodial arrest is one exception to the warrant requirement. A search can precede an arrest. Where the search precedes an arrest, it must be shown that probable cause to arrest existed before the search and the arrest and search were substantially contemporaneous. Another exception to the warrant requirement is the doctrine of inevitable discovery. The inevitable discovery exception establishes that evidence derived from an unlawful search is not inadmissible under the fruit-of-the-poisonous tree doctrine if it is shown the evidence would have been uncovered without the unlawful search.

The defendant claimed that probable cause to arrest must be particularized with respect to each person arrested and that a person's mere presence with others independently suspected of criminal activity does not, without more, give rise to probable cause to search a person. He claimed that his presence in the automobile, which he did not own, was not enough for law enforcement to suspect him of criminal activity or to search his person. He claimed that the pocket search was not conducted incident to an arrest and that the officers had no probable cause to arrest him until they uncovered the Wal-Mart receipt.

Rejecting these claims, the court found that the officers had probable cause to arrest the defendant at the time of the pocket search and, when viewed objectively, had placed the defendant under arrest by the time of the search. The search was justified as a search performed incident to the defendant's arrest.

Upon seeing the methamphetamine paraphernalia in plain view in the automobile, the officers had probable cause to believe that some drug related crime was either committed or attempted. North Dakota law authorizes an officer to arrest a person without a warrant for a public offense committed or attempted in the officers' presence, when the person arrested has committed a felony although not in the officer's presence, and when a felony in fact has been committed and the officer has reasonable cause to believe the person arrested to have committed it. The officers have the required authority to arrest the responsible parties without first obtaining a warrant. The primary question is whether the officers have probable

cause to believe the defendant committed the crime.

Applying Maryland v. Pringle, 540 U.S. 366 (2003), the court noted the United States Supreme Court had unanimously rejected reasoning nearly identical with that advanced by the defendant. To determine whether an officer had probable cause to arrest an individual, the court will examine the events leading up to the arrest and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable officer, amount to probable cause.

The defendant's situation is indistinguishable from Pringle. Any facts serving to distinguish the defendant's case from Pringle strengthen the finding that probable cause to arrest the defendant existed. The drug paraphernalia evidence in this case was far larger than the cash and drugs discovered in Pringle. The smell of anhydrous ammonia emanating from the automobile was immediately noticeable to the deputy standing outside the car. Both these facts indicate the defendant had knowledge of, and exercised dominion and control over, the drug paraphernalia. A reasonable officer would conclude there was probable cause to believe the defendant committed the crime of possession of drug paraphernalia relating to methamphetamine either solely or jointly with the other occupants of the motor vehicle.

In addition, the driver of the vehicle indicated the can of paint thinner located on the backseat belonged to the defendant. This statement provided an indication that the defendant played some role in supplying the components to the underlying drug offense. Although this statement is not critical to validating the officer's conduct, it did provide probable cause to believe the defendant was involved in the conspiracy to manufacture methamphetamine. Objectively it was reasonable to infer a common enterprise between the driver and the defendant, and the court rejected any claim of a guilt by association defense by the defendant.

Existence of an arrest is a question of law. An arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of the person making the arrest. The defendant was not "formally" placed under arrest until approximately 20 minutes after the pocket search. In addition, an officer testified that the defendant was simply being detained before the time of his formal arrest. However, an officer's subjective intent or outward statements do not

necessarily control whether, or when, a party is under arrest. Rather, the court will objectively examine the totality of the circumstances to determine whether an arrest occurred. Formal words of arrest are not a condition precedent to the existence of an arrest. An arrest can occur before an officer formally informs a suspect he is under arrest.

The proper objective test asks whether circumstances existed that would have caused a reasonable person to conclude he was under arrest and not free to leave. The benefit of taking such determinations out of the subjective or discretionary realms and placing them on objective ground is obvious. Without such a protection of individual rights the police would be free to question a suspect relentlessly without first informing him of his constitutional rights by delaying the magic words that would trigger a custodial arrest.

A reasonable person in the defendant's situation would have concluded he was under arrest when he was removed from the automobile by the deputy, if not earlier. The court could not believe that a reasonable person, found in an automobile smelling of anhydrous ammonia with an abundance of drug paraphernalia in plain sight would feel free to exit the car, much less the crime scene. This fact is reinforced by the presence of three officers on the scene.

It was apparent that the defendant was under arrest well before being formally informed of such at the law enforcement center. After the Wal-Mart receipt was discovered, the defendant was almost immediately placed in handcuffs, taken to a deputy's automobile, and read his Miranda rights. Absolute restraint of the defendant's movement occurred immediately after the pocket search, coupled with the knowledge that a search can precede an arrest and still be valid, reinforced the court's holding.

The officers had probable cause to arrest the defendant prior to the pocket search and had restrained his freedom of movement upon removing him from the automobile, if not before, and a search of the defendant's person was appropriate as a search incident to an arrest.

The court also rejected the defendant's claims that the conviction after the second trial should have been overturned on double jeopardy grounds because the district court erred in declaring a hung jury and a mistrial in the first case. The defendant asserted that the jury deliberated

approximately 2½ hours before declaring itself hung and argued the jury should have been required to continue to deliberate even if it meant coming back for a second day. The defendant also asserted that inconsistencies in the state's case caused the hung jury. By permitting a second trial, the state was permitted to call additional witnesses and a second chance to try its case free from the errors and oversight that resulted in a hung jury in the first trial. Claiming the state commenced the first trial without sufficient evidence to convict, the defendant asserted it should not have been afforded a second opportunity to accomplish its aim.

The general rule is that a person is put in jeopardy when his trial commences, which in a jury case occurs when the jury is empanelled and sworn, and in a non jury trial when the court begins to hear evidence. In cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy is attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial. The Double Jeopardy Clause does not prohibit retrial in every instance when the first trial is terminated prior to verdict. Each case in which a double jeopardy violation is asserted must turn upon its own facts and no rigid, mechanical rules are applied in the interpretation of the Double Jeopardy Clause.

A trial judge has discretion to declare a mistrial. However, this decision is not one to be lightly undertaken since the interest of the defendant in having his fate determined by the jury first empanelled is itself a weighty one.

In this case, the state took no action to force or trigger a dismissal. Mistrial frequently will result because of confusion over the evidence presented. Here, in contrast with many mistrial situations, the state was able to pinpoint what piece of evidence seemed to confound the first jury. Armed with this knowledge the state took steps to address this deficiency in the second trial. Although these steps presumably aided the state, this is not the type of benefit that implicates the Double Jeopardy Clause.

The state must make the decision about what evidence to present to the jury. Mistakes inevitably will be made. Whether the state knew of the discrepancy regarding the evidence, thought it unimportant, or believed it could explain any inconsistency through other evidence is irrelevant. The state empanelled a jury, tried its case, and was willing to let the first jury decide the defendant's fate. That the first jury was unable to

reach a unanimous decision does not automatically lead to a double jeopardy bar.

The trial court did not abuse its discretion in finding the first jury hung and declaring a mistrial. Trial judges must both encourage a jury to work diligently to reach a verdict but not push the jury to a point where the decision will no longer be the product of an impartial deliberative process. The court did have some concern with the rather short length of deliberation that occurred in this case. However, the record revealed the trial judge

struggled with the issues and spent considerable time discussing available options with the attorneys involved. The trial judge inquired into the divisive issues stymying the jury and took a poll of the jurors to determine whether they thought a verdict could be reached, to which eleven jurors said they could not reach a verdict. Given the depth of this division and the result and threat imposed to impartial verdict, the trial judge acted within the confines of his discretion, manifest necessity, and the ends of public justice in declaring a mistrial.



*Wishing you and your family a safe,  
happy, and pleasant holiday season.*

*W. Lee Stegman*

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